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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-31

HONOLULU RAPID TRANSIT COMPANY, LIMITED,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII, and THE CITY AND COUNTY OF HONOLULU,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Appendix B of the Petition) has not yet been reported. The opinion of the Court of Appeals for the Ninth Circuit (Appendix A of the Petition) has not yet been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does a State, in the grant of a utility franchise, violate the Fifth and Fourteenth Amendments of the United States Constitution when it includes a term which authorizes a county at some future date to purchase the franchisee's properties used and useful for utility purposes at a price which is less than fair market value?

STATUTES INVOLVED

The relevant part of Section 20 of Petitioner's franchise (Act 186, Session Laws of Hawaii 1921) is quoted below. Petitioner's franchise is set forth in toto in Appendix D of the Petition.

> "SECTION 20. Purchase by City and County of Honolulu. City and county authorized to purchase and operate. At any time after authorization therefor by a majority of the registered voters of the City and County of Honolulu voting thereon at an election held in manner and form and under the terms and conditions as may be hereafter provided for by the legislature of Hawaii for this purpose, the City and County of Honolulu, or its successors, may, upon not less than six months' notice in writing to the company, acquire the property of the company used and useful for public utility purposes by paying

to it the amount hereinafter provided, and assuming the bonded and all other debts and liabilities of the company at the date of said purchase.

"The amount to be paid to the company for such purchase shall be determined by the public utilities commission; but such amount shall in no case exceed the actual cost of the physical property thereof, or the actual value of the tangible property so purchased; in both cases, less its bonded and all other debts and liabilities. The value of the franchise or good will or any other intangible element shall not be considered in determining the amount to be paid.

"The valuation for the purpose of purchase shall be determined by the commission on the request of the board of supervisors prior to the election, provided, however, that such valuation shall be increased or diminished to correspond to the actual physical changes in the property of the company between the date of the valuation and the date of the actual purchase, the same to be determined by the commission.

"Either the company or the purchaser may appeal to the supreme court of Hawaii from the decision of the commission by filing a written notice of appeal with the commission within five days after the decision is rendered and served on the company and the City and County of Honolulu. It shall be the duty of the commission immediately to certify up to the supreme court the record of its proceedings showing in such certificate the valuation claimed by the company, the valuation claimed by the purchaser, and the

valuation as determined by the commission. Such certificate shall be accompanied by copies of all papers, documents, and evidences upon which the decision was based and a copy of such decision. Upon such appeal the supreme court may in its behalf take or require further evidence to be introduced by either party.

"Within six months after the determination of the purchase price the same shall be paid to the company, and thereupon the franchise granted hereby shall cease and determine, and all the property of the company so valued shall become the property of the purchaser without any further conveyance or assignment; but the company shall make all such further conveyances and assignments as may be desired by the purchaser and approved by the commission or the said court on appeal.

"The City and County of Honolulu or its successors, is hereby given the right under the conditions aforesaid to purchase, hold and operate the street railway system or systems so purchased and said city and county and its successors shall have all powers incidental thereto. . . ."[1]

STATEMENT OF THE CASE

Petitioner omitted, as required by Rule 23(g) of this Court's Rules, to cite the "basis for federal jurisdiction in the court of first instance." The jurisdic-

[1]Act 300, S.L.H. 1967, amended the first paragraph of Section 20 by deleting the requirement of a referendum and providing six months' notice to the Petitioner. Instead, an ordinance authorizing the acquisition had to be enacted by the City Council. All other matters in Section 20 remained the same.

tion of the District Court was invoked by Petitioner under the following authorities:

28 U.S.C. §§1343(3) and (4);
42 U.S.C. §1983;
28 U.S.C. §1331;
28 U.S.C. §§2201 and 2202;
28 U.S.C. §§2281 and 2284;
49 U.S.C. §§1601 et seq.;
42 U.S.C. §3072

and the Fifth and Fourteenth Amendments of the United States Constitution (Cl.R. 3). The District Court based its jurisdiction on the federal question presented and where the amount in controversy exceeded $10,000.00. (28 U.S.C. §1331 (Cl.R. 449)

Petitioner's Statement of the Case is adequately set forth in the Petition. However, Respondent Public Utilities Commission, Department of Regulatory Agencies, State of Hawaii, hereinafter "PUC", disagrees with Petitioner's statement as to the basis for the District Court's dismissal of the case wherein it stated on page 6 of the Petition:

> "The District Court dismissed the action, holding that a government body could include in the grant of a statutory franchise any provision it wished—including one for the taking of private property for public use without the payment of just compensation (Cl.R. 450-453)."

The District Court in its memorandum decision never stated that the acquisition by the City was a "taking." *In fact* the District Court held "that the

acquisition of HRT property under the franchise is *not a condemnation situation, but as in Janes v. The City of Racine* [143 N.W. 707 (1913)] *all that is before this Court at this time is the fact that the City wants to purchase HRT property under the terms and conditions of the franchise contract made in 1921; a contract that HRT has become unhappy with.*" (Emphasis added.) (Cl.A. 452)

ARGUMENT

Respondent PUC adopts and reiterates for its Argument portions of the District Court's decision, a decision that was succinct and penetrating in its analysis:

> "HRT voluntarily, with its eyes open and uncoerced, accepted this franchise in 1921. Indeed the internal communications of the company, submitted as an exhibit by HRT, leads this court to the conclusion that HRT deliberately sought in substantially the same form the very franchise which was subsequently enacted. It did so on the firm belief that such an open end franchise was to their advantage, and they were perfectly willing to accept the terms regarding purchase when and if that should ever come about. Consequently, this court finds the *Frost* case, relied on by the Plaintiff as authority for the proposition that an individual or corporation cannot be forced by a state to waive a constitutional right in exchange for the grant by the State of a privilege, to be inapplicable here." (Cl.R. 451)
>
> * * *

"When one recognizes that HRT worked for the very contract that it now attacks, then the claimed unconstitutionality of Section 20 of the Franchise as a deprivation of its constitutional right reaches the point of frivolity in the face of the cases on this very problem. As this court has said, the cases are clear that the grant of a franchise by a subdivision of the State, or the State itself, and its acceptance by the grantee constitutes a contract. Since this proposition has been clearly and finally settled by the decisions of the courts of nearly every state of the union and the Supreme Court of the United States, the federal question raised by Plaintiff's complaint is very slight indeed when all the facts are before the Court. Thus, this Court finds that HRT, having gone into the contract with open eyes, and open ears, and open arms is bound by the terms thereof." (Cl.R. 453)

I.

THE DECISION BELOW IS CLEARLY CORRECT

Since *Dartmouth College v. Woodward,* 4 Wheat. (U.S.) 518 (1819), it has been a cardinal rule of law that a franchise is a contract between the grantor and the grantee. See also *Territory v. Fung,* 34 Haw. 52, 61 (1936). To have a contract, there must be an acceptance and performance under the terms of the franchise. *New Orleans Water-works Co. v. Rivers,* 115 U.S. 674 (1885); *Louisville Gas Co. v. Citizens' Gas Co.,* 115 U.S. 683 (1885). The record indicates that HRT accepted the franchise (Cl.R. 31 n. 13, 43)

and has been operating under said franchise for fifty years.

HRT alleges that:

> *"The record shows that the government adopted the franchise and presented it to HRT on a take it or leave it basis.* There was no negotiating or bidding as would occur when a government contract is let or an eminent domain lawsuit is settled. *Apparently, HRT should have stuck to its rights under the old franchise, rejected the new franchise, and let the public be damned."* (Emphasis added.)

But the record is totally and completely otherwise. The record indicates that HRT was offered a new franchise by the Territorial Legislature in 1921, 7½ or 8½ years prior to the termination of their existing franchise. (Cl.R. 49) After Congress approved the franchise HRT had six months in which to notify the Governor of the Territory of its acceptance or rejection. (Cl.R. 49, 64)

For nearly six months HRT carefully analyzed and reviewed its options (Cl.R. 48-58) and finally transmitted its letter of acceptance to the Governor one day prior to the end of the six-month period (Cl.R. 49, 64, 31). The record also indicates that a special committee of the HRT directors made a comprehensive study of its alternative courses of action and presented same to its directors and stockholders—the report however is absolutely silent on the subject of the option given to the City to *purchase* the HRT assets. (Cl.R. 48-59)

The report of the special committee of the HRT board of directors is *very significant,* however, in that the report indicates that *the form of Act 186 was approved by the company.* (Cl.R. 49) When Act 186 was submitted to Congress, Congress approved Act 186 but eliminated the provision that the Territorial Legislature needed its approval for amendment or repeal of the franchise. (Cl.R. 49) This deletion caused grave concern to HRT since the directors' report places heavy emphasis on the fact that the franchise may be repealed solely by the Territorial Legislature *without compensation* and that HRT may be left with "junk value". (Cl.R. 54) Nevertheless, the directors' report indicates that since the Company "consented to the clause permitting repeal without purchase, provided the Legislature and Congress both approved" it was in no position to argue with the consent it had given to the form of the franchise to the Legislature since the only change made by Congress was that the Territorial Legislature could repeal or amend the franchise without Congressional approval. It appears reasonable from the foregoing to argue that if HRT tried to insert a *purchase provision* into the franchise in the case of a repeal, it must have inserted or agreed to the purchase provision (Section 20 of the franchise) in the event the City decided to undertake the HRT transit operation. This conclusion is inescapable since HRT approved the form of Act 186. (Cl.R. 49)

Notwithstanding the fact that HRT was *completely* aware of all of the terms of the franchise (Cl.R. 48-

58) and *agreed* to the form and content of said franchise (Cl.R. 49) and without question had a more than substantial hand in drafting Act 186, it alleges today that the acquisition by the City is a confiscatory act. It relies, in substance, on the doctrine enunciated in *Frost Trucking Co. v. R.R. Comm.*, 271 U.S. 583 (1926), wherein the Court held that though a state may have the power, in certain instances, to deny a privilege altogether and may grant such privilege upon certain conditions—it may not impose conditions which require relinquishment of constitutional rights. (pp. 593-594)

The District Court and Court of Appeals for the Ninth Circuit held that the principle enunciated in the *Frost* case, based on all of the facts before the Court, to be inapplicable to HRT's case. (Cl.R. 451; p. 4 of Appendix A of Petition)

In *Portland General Electric Co. v. Federal Power Com'n*, 328 F.2d 165 (9th Cir. 1964), the issue raised was whether there was a taking without due process of law when the government required as a condition to granting a license to construct improvements on navigable rivers under the Federal Power Act, that the licensee convey, free of cost, such lands and rights-of-way the government may someday require for the purpose of constructing navigation facilities. The Court held that there was no taking:

> "This is not true because petitioners are not required to accept the tendered license. Any license rights which petitioners ever had to construct and maintain these project works expired

> in 1954. . . . In applying for a major license effective as of 1955, petitioners seek rights they do not now have. In order to gain those rights they must accept the license upon such terms as Congress has determined should be imposed in the public interest. (citations omitted) ***It is not a taking for the Government to withhold a benefit it is not contractually or constitutionally obliged to confer.*** Nor is it a taking for the Government to impose financial obligations upon the recipient of a benefit, if, as here, the benefit may be declined." (Emphasis added.) (p. 173.)

In *United States v. Appalachian Power Co.*, 311 U.S. 377, 427-428 (1940), the Court upheld the right of the government under the Federal Power Act to insert a statutory condition in the award of a license that enables the government, at the expiration of the license, to purchase the power plant at a "net investment" price which is conceded to be less than fair market value. The Court cited on the issue of "confiscation", the case of *Fox River Co. v. R.R. Comm.*, 274 U.S. 651 (1927), as being "decisive". The right of the government to purchase the power plant at less than market value was the price which the person paid to obtain the special privilege from the government.

To the same effect:

Albrecht v. United States, 329 U.S. 599 (1947).

Further, as reasoned by the Court of Appeals for the Ninth Circuit:

> "HRT's contentions, if valid, would gravely prejudice if not destroy the power of government

to utilize options to acquire property, through making it impossible for the seller to commit himself to a sale price. Hindsight would always be available to compel price adjustments on the theory that the price no longer constituted just compensation.

"An exchange of economic benefits such as this franchise represents underlies every commercial contract and the Supreme Court has left no doubt that the Federal government enjoys power to conclude commercial bargains. Further, it may employ the remedies available to private citizens in enforcing a contract. *Rex Trailer Co. v. United States,* 350 U.S. 148 (1956); *Perkins v. Lukens Steel Co.,* 310 U.S. 133 (1940). The states enjoy a parallel power, *United States v. Bekins,* 304 U.S. 27 (1938). The doctrine of unconstitutional conditions does not strip state and federal governments of this indispensable and long acknowledged power." (p. 5 of Appendix A of Petition.)

The cases are clear that franchise terms which create a duty or burden on the franchisee or grants a benefit to the government will be enforced against the franchisee since the acceptance of those terms was the price which the franchisee paid to obtain the special privilege that the State or municipality granted. HRT had no vested or inalienable right to demand a franchise nor was the State contractually or constitutionally bound to grant HRT a new franchise after the expiration of its original grant. The terms of the 1921 franchise were clear and if HRT did not care for the bargain, it could have refused. HRT, however, with eyes and ears open to the opportunity to

make "more lucrative profits" (Cl.R. 452) for the future, accepted the franchise. The acceptance and performance of its part of the bargain sealed the contract.

II.

THERE IS NO CONFLICT OF DECISION

Petitioner asserts that in the instant case the Ninth Circuit decision is in conflict with decisions of the Fifth and Eighth Circuits, but a review of the facts and holdings of each case cited clearly indicates that the cases are not applicable or in conflict with the holding in the instant case.

In *United Gas Pipeline Company v. Terrebonne Parish Police Jury,* 445 F.2d 301 (1971, 5th Cir.) aff'g 319 F.Supp. 1138 (E.D.La. 1970), the plaintiff, United Gas Pipeline Company, sought a building permit from the Terrebonne Parish to construct its interstate pipeline under the Parish's right-of-way. In order to obtain the permit, United had to comply with an Ordinance No. 1682 which related to certain technical engineering requirements for pipeline construction and safety and for the removal, raising and lowering of Permittee's pipeline resulting from a Parish public project. A further condition precedent was added that "if said proposed pipeline or any portion thereof interferes with any future public improvement in said parish, it, United, will alter, relocate, or remove, at United's sole expense, the pipeline on that portion of the land covered and affected by the aforesaid right-of-way and servitude which United purchased from the South Coast Corporation *which is*

not under the road." (Emphasis added.) 319 F.Supp. p. 1143.

United protested to the *additional* condition precedent imposed for the building permit and to the constitutionality of Ordinance No. 1682 on several grounds.

The trial Court held that the imposition of the additional condition to have United alter, relocate or remove its property which is not under the Parish's road at its own expense amounted to a taking of United's property without the payment of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court cited the *Frost* case, *supra,* as one of its authorities. The Court also held that Ordinance No. 1682 was unconstitutional in that the Federal government had exclusive jurisdiction and had wholly pre-empted the subject matter.

A critical reading of the facts of the case, however, clearly demonstrates that the trial Court held that there was a "taking" of United's property only because the Parish was "taking" property belonging to United which was on United's *private* easement which it purchased from a third party and was in no way connected to Terrebonne Parish's right-of-way. There is nothing in the decision to indicate that there would have been a "taking" if the condition to alter, remove or relocate its pipeline as a result of county improvements were *within* Terrebonne Parish's right-of-way. Ordinance No. 1682, in fact, had a provision requiring this act of the Permittee.

The Fifth Circuit reiterated this position when it stated:

> "In this cause we agree with the judgment and conclusion of the District Court, 319 F.Supp. 1138, that Terrebonne Parish Police Jury cannot require, as a condition to the issuance of a construction permit to construct, maintain and operate an interstate gas transmission pipeline under a public road within the Parish, that the gas pipe line compainy pay the cost of relocating, altering or removing pipelines of the Gas Pipe Line Company (appellee) *outside of the highway or road right-of-way. . . .*" (Emphasis added.)

The decision was clarified further and served clear notice that it was possible to have United remove, alter and relocate its pipeline *within* the right-of-way when the Court stated on p. 302 the following:

> "We do not hold that the Parish Police Jury cannot enact a valid ordinance requiring permits with reasonable conditions."

Since Ordinance No. 1682 was struck down as being unconstitutional, it served to indicate that an ordinance could be enacted which included reasonable conditions, e.g., removal of pipeline within the Parish's right-of-way.

In the instant case, the purchase of HRT's properties is limited to properties "used and useful for utility purposes" and no other. The properties being purchased are part and parcel of a utility operation, which properties HRT agreed to sell when it accepted the franchise.

We submit that the Ninth Circuit decision is not contra to the *Terrebonne Parish* case since Section 20 of the franchise in the instant case does not purport to purchase any property not "used and useful for utility purposes."[2] No condition precedent was imposed on Petitioner to sell any properties not used and useful for transit operations at the time the franchise was being offered to Petitioner. We further submit that the *Terrebonne* case supports Respondent PUC's franchise in that the Fifth Circuit indicated that reasonable conditions may be imposed in the granting of a permit. The authorities herein cited support the proposition that the purchase of properties at less than fair market value is a reasonable condition to include in a franchise or a permit.

Petitioner cites *Midwest Video Corporation v. United States,* 441 F.2d 1322 (8th Cir. 1971), rev'd, 40 U.S.L.W. 4626 (U.S. June 7, 1972) to indicate another Court of Appeals decision to be in conflict with the Ninth Circuit decision in the instant case. Petitioner being in error with respect to the holding of the Eighth Circuit in the *Midwest Video* case is also in error when it states that said decision is in conflict with the instant case. Petitioner alleges that in the *Midwest Video* decision by the Eighth Circuit, the cablecasting rule as it applies to existing operations with 3,500 or more subscribers, was struck down on the authority of the *Frost* case. This is error since

[2]A stipulation was entered into between HRT and the City and County of Honolulu and PUC that only those properties belonging to HRT would be acquired under Section 20 of the franchise. (Cl.R. 443-444)

the basis for the Eighth Circuit ruling was that the FCC was *without authority* to impose a program originating rule under existing statute and case law.[3] The Court reviewed the Communications Act of 1934 and case authorities such as *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1918) and *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390 (1968) to make a determination as to what powers the FCC had, absent legislation, in its regulation of the CATV industry. Upon review of said Act and cases, the Court held the FCC did not have the authority to require cablecasting.

The *Frost* case was cited only for the proposition that there *may* be confiscation of property of existing CATV operators due to high start-up costs of program origination resulting in forcing certain operators out of business. This Court, however, met the issue of confiscation of property squarely and disposed of same when it cited in its reversal of *Midwest Video Corp.*, 40 U.S.L.W., pp. 4633-4634, at footnote 31, a portion of Judge Tuttle's decision in *General Telephone Co. of Southwest v. United States*, 449 F. 2d 846, 863-864 (CA 5, 1971) which stated in part:

> ". . . The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that

[3]The Court held on page 1328 the following:

"We hold that the Federal Communications Commission is without authority to impose the program originating rule on existing cable television operators." The *Frost* case was not cited for this holding.

> new rules may abolish or modify pre-existing interests . . ."

Further, the Eighth Circuit held that confiscation would take place *only* as to existing operators. For those operators who volunteer the cablecast, the Court stated:

> "We pretermit consideration of the validity of the rates promulgated with respect to CATV operators who voluntarily elect to cablecast." (p. 1328)

It is reasonable to assume from the foregoing determination that a person who volunteers to cablecast would not have standing to attack the cablecasting rule nor would there be any confiscation.

Respondent PUC submits that in the instant case, the State of Hawaii did not change the original terms of the franchise agreed to by Petitioner in 1921. No new rule or legislation amends the purchase price agreed to by Petitioner which has been in existence for over fifty years. The then Territorial Legislature, with the approval of the United States Congress, enacted legislation granting a franchise to Petitioner which was in the public interest. It further included a provision granting an option to the City and County of Honolulu to purchase Petitioner's properties that were used and useful for utility purposes at some future date as being a reasonable ancillary condition with the award of the franchise. Under said facts, there is no confiscation of property as the District and the Circuit Court of Appeals have held. The City is merely exercising an option granted to it by the

State and *voluntarily approved* by Petitioner in 1921. We submit that the *Midwest Video* decision by the Eighth Circuit which was reversed by this Court is not applicable or in conflict with the holding made by the Ninth Circuit in the instant case. We further submit that this Court disposed of the issue of confiscation in *Midwest Video* when it cited *General Telephone Company of the Southwest* case, *supra.*

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Throughout the proceedings in the District Court and the Court of Appeals in this cause, Petitioner has constantly reiterated its position that the purchase price for the properties used and useful for utility purposes agreed to by Petitioner was offered on a "take it or leave it" basis or Petitioner was faced with a "rock or whirlpool" situation as enunciated in the *Frost* case. However, the report of Petitioner's directors to its stockholders in 1921 (Cl.R. 48-58) clearly demonstrate that there was no coercion, exaction or a "take it or leave it" condition made by the State. Both the District Court and the Court of Appeals found that the acceptance of the franchise by Petitioner in 1921 was "an act of free choice." (Cl. R. 452; p. 6, Appendix A of Petition) Where there has been no coercion or exaction, and the record amply demonstrates this fact, all that remains is a contract term whereby the Petitioner agreed to sell to the County its properties used and useful for utility

purposes at some future date. That day has arrived and the City and County of Honolulu is exercising its option granted to it by the State to *purchase* Petitioner's properties. There is no dispute that a State may enforce a contract term the same as any other private person. *United States v. Bekins,* 304 U.S. 27 (1938). On the issue of confiscation, the *Portland General Electric, Appalachian Power, Fox River Co.,* and *Albrecht* cases have held, under facts similar to the instant case, that there is no "taking" in violation of the Fifth Amendment or Fourteenth Amendment involved.

We submit that Petitioner has presented no important question of federal law for this Court to decide, and we further submit that the authorities cited by the District Court and the Court of Appeals for the Ninth Circuit in this cause are "decisive" on the issues raised.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 11, 1972.